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General Jurisprudence, Empirical Legal Theory, Epistemic Fruit, and the Ontology of 'Law': Scope, Scepticism, Demarcation, Artefacts, Hermeneutic Concepts, Normativity and Natural Kinds

John McKay

Abstract:

Positivist and natural law theories are interested in answers to different questions, and are mostly compatible. But positivists and empirical legal theorists (ELTs) each claim to offer a genuinely descriptive account of law, and a better position from which to criticize real world legal institutions. They deploy different heuristics, primarily in the guise of points of view (internal vs external), which betray differing commitments to offering a descriptive account of law, and to the separation thesis. They also have different ideas about the nature of the object in question and consequently how it might be known. For positivists law is artificial and dependent on the existence of states (though states are left untheorized). For ELTs law is a naturally occurring social phenomenon (analogous to language) discernible by structures and functions. These different ontologies suggest different epistemic standards (normal vs special) for knowing the object. This paper clarifies key points of dispute between these two camps, and argues that on several fronts ELT offers up a more plausible and useful theory of law. A recent paper by Brian Leiter, "The Demarcation Problem in Jurisprudence," and some of his earlier work on naturalizing jurisprudence, help to frame the discussion.

Keywords:

Legal Theory, Legal Philosophy, General Jurisprudence, Naturalization, Naturalism

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General Jurisprudence, Empirical Legal Theory, Epistemic Fruit, and the Ontology of ‘Law’: Scope, Scepticism, Demarcation, Artefacts, Hermeneutic Concepts, Normativity and Natural Kinds

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1. Introduction

There are, no doubt, many reasons one might want to theorize about law in a philosophical mode. One ongoing reason is to address the key question(s) of general jurisprudence, viz., what is law, or what is its nature, essence, defining attributes, or necessary elements. There are some fairly well rehearsed arguments about how we should understand these questions, and a not insignificant amount of argument between advocates of different approaches. Despite the fact that different accounts of law are frequently pursuing different theoretical goals, and offer different descriptions of reality that are, in many ways, compatible with one another, there is, nonetheless, a great deal of argument about which account is “correct.”

Different accounts generally fall into one of three camps: legal positivism, natural law and social scientific or empirical legal theory (ELT).¹ Despite the existence of *some* variability between particular versions within each of these accounts, there is significant agreement within each group as to what the nature of the object in question is, how it is to be known, and what modes of investigation are likely to produce knowledge of it. Members of all the camps are primarily interested in a real world phenomenon or set of phenomena.² I take this to be uncontroversial. We might take various approaches to trying to understand real world phenomena, depending on what they are and what we want to know about them. The members of the three different camps of legal theorists have distinctly different views about the nature of the object in question, what is knowable about it, what is worth trying to know, and the purposes of engaging in the theoretical project.

Insofar as these different theoretical accounts of law focus on different objects there is significant compatibility amongst them. There *is*, however, a significant dispute between ELT and positivists about the project of a descriptive account of law, though dealing with

¹ I am borrowing the phrase “empirical legal theory” from Roger Cotterrell, *Politics of Jurisprudence*, (U of Pennsylvania Press 1989) 235, and believe I am using it much as he does, and in a way that means much the same as social scientific legal theory, as invoked by others, notably Tamanaha, below. Empirical or social scientific legal theory refers to a family of theoretical accounts (much as legal positivism and natural law are also families) that includes legal anthropology, legal sociology, legal pluralism, and much of American legal realism. The name “legal pluralism” emphasizes one aspect of a serious empirical theory, namely, that the dogma of the unity of law, held by positivists (at least implicitly), is dismissed; while law always claims unity and pre-eminence as a normative force within its jurisdiction, normative force is also invariably a matter of contention. Now, obviously much work that would be thought of as falling into one of these versions of ELT might not be very “theoretical.” Nonetheless, there is theoretical ELT work from each version, and, I will argue, the theoretical work from different versions of ELT share a set of epistemic and ontological commitments.

² Trying to understand the nature of such phenomena might involve moments of pure abstract thought, such as considering the nature of law for a society of saints or angels.

this dispute does not necessarily mean that one or the other account must be generally wrong. However, I will argue that when it comes to the questions of general jurisprudence ELT does the best job of addressing its questions if we focus on normal, generally used epistemic standards. The work done by both natural law and positivist accounts of law should be seen as more limited in their scope and specialized in purpose.

2. Positivists v. Natural Lawyers ...

For a long time philosophical arguments in general jurisprudence have been dominated by arguments between advocates of some version of natural law and advocates of some version of legal positivism. As the arguments currently stand the differences between these two camps often seem like ones of emphasis, and of the lexical right to claim the word “law” for one’s own camp. The natural lawyers emphasize the normative structure of law and see (non-defective) law as satisfying some reasonably acceptable political morality. Positivists place the emphasis on law as a particular structural element of a sufficiently well constituted political system; the existence of any particular law depends on it having the right political source. Natural lawyers fully accept that there is an important real world phenomenon commonly referred to as positive law (which frequently includes defective laws, though ideally it would not). Positivists fully accept that for positive law to have a moral claim on our obedience (for political obligation to obtain), that law must fit in with, and satisfy, a reasonably constituted political morality (though it is still law, even if it doesn’t do so). A centrally important ongoing driver of the debate between natural lawyers and positivists is the claim to offer a better position from which to criticize law that fails to satisfy a reasonable political morality. Natural lawyers assert that because their conception of law entails an inherent moral evaluation of law that their position is superior. For natural lawyers defective positive law does not quite merit the name law.³ Positivists assert that because their position holds that the existence of law is a contingent fact of political institutions, and is morally neutral or inert, that it leaves infinite space for the moral critique of any actually existing laws or political institutions. Positivists frequently find themselves the object of what they see as unjustified criticism; their critics portray the positivist position as being that we are

³ This is often thought to be the essence of natural law and summed up by the Latin phrase *lex iniusta non est lex*, or unjust law is not law. Finnis suggests, rightly I think, that this is not really a distinctive characteristic of natural law theorizing as opposed to positivist theorizing. It simply states a position shared by both that the bindingness of law (at least its moral bindingness, though possibly its legal bindingness) is undermined by its iniquity. Finnis writes: “The meaning of “an unjust law is not a law” is essentially identical to Hart’s “This is law but too iniquitous to be applied or obeyed” (or availed of as a defense). The excitement and hostility aroused amongst modern legal theorists (notably Hart) by the former way of speaking is unwarranted. No one has difficulty in understanding locutions such as “an invalid argument is no argument,” “a disloyal friend is not a friend,” “a quack medicine is not medicine,” and so forth. “*Lex iniusta non est lex*” has the same logic; it acknowledges, in its opening words, that what is in question is in certain important respects—perhaps normally and presumptively decisive respects—a law, but then in its withdrawal or denial of that predicate it affirms that, since justice is the very point of having and respecting law at all, this particular law’s deficiency in justice deprives it of the decisive significance which all law purports to have.” Finnis, John, “Natural Law Theories”, *The Stanford Encyclopedia of Philosophy* (Fall 2011 Edition), Edward N. Zalta (ed.), URL = <<http://plato.stanford.edu/archives/fall2011/entries/natural-law-theories/>>. Finnis goes on to note that the “slogan-form locution” often attributed to Aquinas, viz., *lex iniusta non est lex*, never actually occurs in his writings.

morally required to obey the iniquitous demands of a political institution based on power. The positivists object that they quite simply do not hold that position. Law demands our obedience, but this is law's demand, not a moral requirement, ie, political obligation does not obtain, and the social fact of law has no inherent goodness, and indeed is prone to significant abuse, and use for evil purposes. Nonetheless, many positivists seem to have invited this confusion by suggesting that under their description of law it is more than a brute, morally neutral, social fact, and has some kinds of inherent goodness.⁴

3. ... and Positivists versus Empirical Legal Theorists

The rest of this paper will focus on an argument between empirical legal theory and legal positivism with respect to their differing ontological and epistemic commitments.⁵ Positivists argue, as against natural lawyers, that they have a better critical stance for considering positive law. They make this claim based on the idea that understanding law as a morally neutral social fact affords a better critical stance because it makes no claim about the goodness of law. What's more, they claim, their description of this actually existing socio-political institution, whatever flaws that institution might have, is better for critiquing positive law than what natural lawyers offer precisely because it is a

⁴ A fuller exploration of this issue (no pun intended) is beyond the purview of this paper; but, briefly, positivists invite this criticism by making various claims about law that seem to make of it significantly more than a brute social fact, and indeed seem to claim for it various forms of goodness. For instance, Hart, in *The Concept of Law*, (Oxford UP 1994 [1961]) is careful to distinguish "legal obligation" from merely being "obliged" (6) or "coerced" (19). He intends to be countering Austin's "gunman writ large" account of the law by suggesting some rule of law virtue is constitutive of the structure of law. The more important current thread comes out of Raz and his followers that law claims exclusionary or preemptory reasons for action, ie, its reasons exclude or pre-empt our own moral reasoning. This claim relies on Raz's service conception of authority and says that law has authority precisely because (and insofar as) it uses its authority to direct us in ways that we would ourselves choose based on our own interests and reasoning. This is a wildly implausible description of the normal relationship of persons to actually existing positive law, and not in line with an understanding of law as a social fact. Some very strong version of political obligation would have to obtain in order for this to be the case, but the idea that political obligation obtains seems to be an increasingly minority view amongst positivists, or at least that is the assessment of Leslie Green. "A number of legal and political philosophers who do value government under law have become sceptical, and reject both the Lockean and Humean traditions in favour of the view that there simply is no general obligation to obey the law as traditionally conceived (515 "Law and Obligations" in *Oxford Handbook of Jurisprudence and Philosophy of Law*, OUP (2002), J. Coleman and S. Shapiro (eds.)). William Edmundson, *The Duty to Obey the Law*, Rowman and Littlefield (1999) collects many important highlights and is a useful introduction to the rich area of argumentation that is the discussion of political obligation. For a careful critique of the Razian position along these lines see Kenneth Ehrenberg, "Law's Authority is not a Claim to Preemption," in *Philosophical Foundations of the Nature of Law*, Wil Waluchow and Stefan Sciaraffa, eds., Oxford UP, 2013. The most level headed take I have heard about these ideas came from Ken Himma in a post paper discussion at a conference in Hamilton Ontario in May of 2011. He said that, and I am paraphrasing, in general, the only reason he obeyed the law was for prudential reasons, ie, there were serious consequences if one gets caught, and so it is prudent to obey. Asked if he only avoided murder for prudential reasons he said of course not. He avoided murder and many other things for moral reasons, NOT because they are illegal. His comments come across as devilish though they jibe well with Donald Regan's description of the ways in which saints would act in relation to law in a society of saints, in "Law's Halo" in *Philosophy and Law*, J Coleman and E Paul, eds., Oxford UP, 1987.

⁵ Insofar as natural lawyers are interested in fundamentally different sorts of questions they are likely to be agnostic as to this argument. Insofar as they tend to take a side it is not qua natural lawyers that they do so.

description of real law in the world. But on both the critical stance claim, and the description of reality claim, the account of law provided by ELT does a better job.⁶

The virtues positivists claim for their account are rooted in it being a normatively neutral description of reality, but ELT does a better job at this. As I have already suggested there are various reasons we might theorize about law, but amongst the key reasons are epistemic reasons. We theorize so that we can know the object in question, so that we can know what the shape of the real world is. There are several elements to the epistemic argument between positivists and empirical legal theorists (ELTs). Positivists look to the legal systems of advanced states as their object, and claim that this is what in fact we mean generally by law. They hold up this instance of law as the prime case and try to deduce truths about law from their chosen exemplar. ELTs accept that state law is one instance of what they understand law to be, but think it a mistake (and one that frequently leads positivists astray) to try to understand the phenomenon of law based on this one type of law. ELTs understand law to be a more generalized phenomenon of societies that create mandatory normative requirements and some form of enforcement. Positivists usually understand law to be an artefact, a purpose-built object of human creation, and that as a consequence of this it presents in an epistemically special way that makes it different from natural phenomena. ELTs think that law is a naturally occurring social phenomenon⁷, something like human language, and as such is investigable and knowable in the normal ways we know realities about the world. While there is nothing wrong with taking state law as a discrete object of investigation, when it comes to one of the main purposes of theorizing, namely having an epistemic tool for understanding the world, it makes more sense to try to understand a range of phenomena with similar structures and functions, as ELTs do. Now, because ELTs believe that law is a natural social phenomenon they approach trying to know what it is – and having a theory about what it is – as a sort of scientific problem. Positivists reject this idea and see law as something artificial, knowable only through special means.

Against several positions commonly taken by positivists, I will argue that positions taken by ELTs are more useful and fruitful. Some positivists reject the idea of theoretical epistemic fruitfulness as important, or even workable. Rather than directly addressing this I will try to show that the idea of law as artificial is unsustainable and not useful. But, if law really is usefully understood as a naturally occurring social phenomenon, and not artificial, this suggests that at least one important job for legal theory is serving the same sorts of purposes that scientific theory does, namely, offering up a description of that reality which attempts to describe the mechanisms that shape reality to be what it is. Different legal theories have different purposes, which suggest different possible normative drivers for theory selection. What sort of tool are we trying to build, what work do we want it to do? I have just suggested that adequacy to reality and epistemic

⁶ Scott Shapiro, *Legality*, Belknap/Harvard UP, 2011, purports to be a positivist account of law, but it is structural and functional in its description of law, and does not assume, as other positivists do, that law is necessarily the product of modern internationally recognized states.

⁷ Just as we refer to human languages that come about in the normal way, through slow evolution that involves various processes of transformation, as natural language, we could, not unreasonably, call this position legal naturalism, ie, viewing law as a natural occurring object in the world, though here I will stick with empirical legal theory so as to avoid potential confusion.

fruit are important drivers if we conceive of law as a natural phenomenon. Positivism generally shares this idea, but falls short in its normative commitment to epistemic usefulness by limiting the range of phenomena in which it is interested to those of the “state.” Positivists tend to either lean on the municipal/ international legal order for a determination of the existence of states, or say that states are those things that have the type of legal systems they are describing. The first position foists the problem on some external determination of what is supposedly being theorized leaving a giant hole in the middle of the theory, the second is circular. Whatever the justification of the limited purview it is a problem when it comes to describing law in the real world. ELT shares the separation and sources theses with positivism – law is different from morality, and its existence and content are fully determined by its social sources. But, unlike positivism, ELT understands the social sources of law to be an entirely contingent matter – the actual social sources of law are whatever they happen to be.⁸ Each of the three camps also tries

⁸ There is a way to read Hart, his description of both the rule of recognition and his emphasis on the internal point of view (POV), in a way that is, at least, close to the position of ELT. By Hart’s account we know what law is by asking a particular social group who are responsible for law in a society what the law is; this group has an implicit rule about recognizing law (the rule of recognition), and shares a sympathetic view to the law (the internal POV). ELTs could say much the same thing – though they tend to emphasize structures and functions, which can be determined from within or without – more on this below. Positivists generally suggest that law is only a product of complex states and their theory suffers from the problems I have just suggested. This does not mean, however, that the legal systems of complex states, recognized by the international legal order, don’t in fact have to deal with law coming from other sources. This is increasingly true of the phenomena now frequently referred to as transnational law, but has long been true in colonial contexts. In the common law tradition when sovereignty passes from a pre-existing state to the colonial power the standard way to deal with the pre-existing order is to incorporate it. Minimally this involves the doctrine of continuity with respect to property, as outlined, for instance, by Viscount Haldane in *Amodu Tijani v. Secretary, Southern Nigeria* [1919] AC 211, where he writes, “A mere change in sovereignty is not to be presumed as meant to disturb rights of private owners (233).” Kent McNeil offers a good discussion in *Common Law Aboriginal Title*, Oxford UP, 1989, esp. at 165 to 179. Property systems created outside of states properly understood can also come to enjoy state recognition and be incorporated, as happened on the western frontier in 19th century USA. Hernando de Soto offers a good description of this history in Chapter 5 of *The Mystery of Capital*, Basic Books, 2000, and argues that the real property holdings of squatters in the slums surrounding developing world cities should be formalized with land titles, and that this will activate capital in the favour of those land owners. A good description of property law and land titles that exist in slums, independent from state law, is in Boaventura de Sousa Santos, “The Law of the Oppressed: the Construction and Reproduction of Legality in Pasargada,” 12 *Law and Society Review* 1, (1977) [Pasargada]. De Soto’s idea of creating wealth through formalizing such titles is not without its problems, see, for instance, my discussion in “Power Dynamics, Social Complexity and the Rule of Law in Development Aid,” 2 *Transnational Legal Theory* 1, 25-65 (2011). The positivist sources thesis says that law comes from recognized sources of law, generally legislative statutes, judicial decisions, and constitutions, however these be written and ratified. Nonetheless, everyone is aware that there is an inter-play between the political sphere, broadly understood, and the legal realm, especially when it comes to sources for law. For the legislative branch that connection is explicit and obvious. Robert Cover in “Nomos and Narrative,” 97 *Harv. L. Rev* 4 (1983-1984) describes the sources of law as rooted in communities of commitment. Cover is most interested in large advanced states, and especially the USA, the kind of states about which positivists are generally most interested. Within such states there is a whole range of communities imbricated throughout the territory. Legislatures and courts, by Cover’s account, act more as filters and ratifiers of norms generated by communities. He is most keenly interested in the ways in which communities try to shape the normative understanding of the public sphere and the shape of the law, and end up in litigation about their claims as to what the law is. By his description the norms these communities generate are already law at the moment they are generated by these communities, ie, the communities are jurisgenerative. In the confrontation with opposing litigants (typically, though not

to claim that they offer an effective critical perspective on actually existing positive law. Now, while it is also possible to select a legal theory for the good consequences for political morality that flow from it, that is not my key point in this essay.⁹ We can usefully think of the empirical approach to legal theory as a version of legal positivism that is more faithful to its neutral descriptive goal.¹⁰

uniquely, the government), the courts must decide whether to accede to this understanding of the law, or, in Cover's description, to kill off that communally created law. In large states, by this account, law is always springing into existence, and it is one of the key roles of the courts of the state to maintain enough coherence amongst the varying points of view of what the law is by continually restraining the creation of such law, by killing it, by engaging in its jurispathic role. Independent of what one thinks of Cover's description, the reality that the sources of law are ultimately in places behind those identified by the standard positivist account is obvious, though, this is importantly a matter of description. Legal positivist's do not deny the political sources of law behind their legal sources, but simply see it as beyond the purview of legal theory proper. Asked about the source of a river the geographer plots a point on a map, the hydrologist talks about the rain, its sources and the watershed – there is no argument between them, just a difference of perspective.

⁹ I briefly noted above that there are good consequences for political morality that flow from ELT, insofar as ELT does a better job at providing a morally neutral description of social facts than does positivism, the basis upon which positivists generally claim the moral preferability of positivism. That argument is not my focus here. The "beneficial moral consequences" as an aspect that might affect the choice of legal theory has a significant pedigree despite the suggestion by some that there is something untoward about its consideration. An oft cited essay on this topic is Liam Murphy's "The Political Question of the Concept of Law," in *Hart's Postscript*, Oxford UP, ed. Jules Coleman (2001). In footnote 6 (373) Murphy lists allies in his argument (MacCormick, Schauer, Raz and Lyons) as well as detractors (Soper and Waluchow). Julie Dickson, "Methodology in Jurisprudence: A Critical Survey," *Legal Theory*, 10 (2004) 117, addresses the viability of such an approach and focuses on Murphy. She writes: "[H]is position seems to commit him to the view that which legal theory we espouse is partly a matter of choice and that the choice is to be made on moral and political consequentialist grounds. ... This position has attracted criticism from some for appearing to turn legal theory into a form of wishful thinking (148)." This topic is also central in Dickson's, *Evaluation and Legal Theory*, Hart (2001). Frederick Schauer, "The Social Construction of the Concept of Law: A Reply to Julie Dickson," *OJLS*, Vol 25 No 3 (2005) 493-501, offers a strong reply to Dickson. He also takes note, rightly I think, that in the Hart-Fuller debate that "although the two plainly disagreed over which concept of law ... would best facilitate disobedience to evil directives, they intriguingly agreed that the tendency of a concept of law to facilitate such an attitude should count in its favour (495)."

¹⁰ Now, while I think an empirical account of law does a better job of providing a general theory of law, and, indeed a better position from which to engage in the moral criticism of law, I do not think that positivists and natural lawyers are simply wasting their time (and ours). Natural lawyers think that non-defective law facilitates a social arrangement that aims at the human good. And this is no doubt the case for non-defective (or, the best of all possible worlds) law. Thinking about the demands of such law is no doubt a valuable exercise. I would characterize it as a certain kind of exercise in theorizing about political morality. Theorizing about natural law, and political morality, by the way, would no doubt benefit from a strong infusion of naturalization – knowing what the good is for human beings, what makes them healthy and happy, can be greatly informed through ongoing empirical investigation. The positivist account of law focuses on state legal institutions from the perspective of insiders. Professional law schools primarily educate practitioners whose advocacy and interactions will be with state legal institutions, and so it is not inappropriate that law school students are given a solid dose of legal positivism. Nonetheless, as currently conceived positivism has shortcomings in describing new developing areas of law, law from other societies, inter-jurisdictional and non-state forms of law, as well as difficulty in accounting for the possibility of revolutionary changes in legal institutions. The positivist account serves as a good introduction for the Western law student. Hart, for instance, intended *The Concept of Law* to be a primer for just such students, but even in the case of the law of modern Western states a scientific view does a better job of accounting for the realities of law.

I turn now to a recent paper by Brian Leiter¹¹ in which he argues, amongst other things, that we should conceive of law as an artefact of human production, and thus as having distinct epistemic properties. I will try to refute his description. I then turn to a wider ranging consideration of arguments between those who conceive of law as a naturally occurring social phenomenon knowable by normal epistemic standards, and those who argue that it is epistemically special. In the latter parts of the paper I turn to the idea of naturalization in epistemology, especially as applied to law. I argue that ELTs, including American Legal Realists, can fairly be described as taking a naturalist position, and that Leiter's description of what such a position entails is mistaken.

4. Demarcation put to Bed

In "Demarcation Problem" Brian Leiter argues that efforts to describe the essence of law, and to so distinguish law from morality, should be abandoned, since they have no prospect of success.¹² He argues that law, like science, is an artefact concept – it identifies the product of a human endeavour – and that as with the long running attempt (and failure) to distinguish science from non-science, the attempt to demarcate law from morality is doomed to failure.¹³ He thus presents what he calls a new case for scepticism. He intends to lay the misbegotten demarcation project to rest. I concur with his conclusion that efforts to demarcate law from morality, by defining their necessary and essential properties, should be laid to rest, though I think he is somewhat misrepresenting the problem and its resolution. Casting the problem as being that of demarcating law from morality is too narrow. While this has frequently been a focus of legal philosophers a more important contemporary problem is that of demarcating law from other law-like normative systems whether they claim to be law (or morality) or not. Related to this point is the work that artefacticity does in Leiter's argument. Artefact concepts point out objects of human creation, like chairs, objects for which the definition of necessary and essential properties is notoriously difficult, if not impossible. Leiter suggests there is no need to argue for the artefacticity of the concept of law, as "something that necessarily owes its existence to human activities intended to create" it, and those who would deny this have extravagant "metaphysical commitments" that would be the subject of "psychological, not philosophical investigation."¹⁴ This is something like a pre-emptive ad hominem defence of his argument, but leave that aside. Leiter says that naturalists and positivists alike agree that law is an artefact; certainly neither makes outrageous claims about the positive law falling out of the heavens, either from god, or from an asteroid, but the claim involves more than that, which I will address below.

What was hoped for from the demarcation project in the philosophy of science was a shortcut that would make it possible to distinguish between epistemically serious

¹¹ B Leiter, "The Demarcation Problem in Jurisprudence: A New Case for Scepticism," 32 *OJLS* 1 (2012) 1 ["Demarcation Problem"]

¹² *ibid*

¹³ Leiter says that his article "owes its existence to a conversation with Larry Laudan" (*ibid* 1) and quotes from Larry Laudan, 'The Demise of the Demarcation Problem' in Robert S. Cohen and Larry Laudan (eds), *Physics, Philosophy and Psychoanalysis* (D Reidel 1983) (5-7) to lay out the rise and fall of the demarcation problem in the philosophy of science.

¹⁴ Leiter, n11, 4

attempts to account for reality and non-serious explanations of the phenomenal world. Laudan describes the crux of the problem as follows:

Through certain vagaries of history ... we have managed to conflate two quite distinct questions: what makes a belief well founded (or heuristically fertile)? And what makes a belief scientific? The first set of questions is philosophically interesting and possibly even tractable; the second question is both uninteresting and, judging by its checkered past, intractable.¹⁵

Leiter draws the parallel between the efforts in the philosophy of science and in jurisprudence to describe necessary and essential properties to distinguish artefacts (science or law, or indeed, chairs) from those things with which they might be confused (junk science or morality, or stumps of logs). But Laudan's point about the ongoing philosophical interest and even tractability of the better-put question (about what makes a belief well-founded or heuristically fertile) is important. If we put Leiter's demarcation problem in jurisprudence to bed, then where are we left? Law and morality both still exist – though the shortcut to their distinction is gone. Leiter suggests that “[s]ome traditional jurists think a solution to the Demarcation Problem would help”¹⁶ answer particular legal/moral questions about things such as whether the US Constitution's Eighth Amendment prohibition of cruel and unusual punishment means that the death penalty is, or should be, legally valid. But it quite simply doesn't. It can be legally valid and yet morally unacceptable. Leiter goes on to take issue with Dworkin's characterization of positivism. The bottom line for Leiter, however, is that dispatching with the demarcation project leaves us in the appropriate position of directly addressing the practical considerations of what ought to be done.¹⁷

Leiter goes on with some choice words for positivists he sees as engaging in ongoing and increasingly “baroque” efforts to solve the demarcation problem, or in the case of natural lawyers, their claim to solve the problem with a “transparent change of the topic.”¹⁸

I take no issue with Leiter's suggestion that we let the problem go and get on with analyses of what ought to be done. But I think putting the demarcation problem to bed and arriving at a new sceptical position has consequences for how we think about law; I don't just mean that as a practical matter we can turn our attention to answering moral questions about what ought to be done knowing that solving the demarcation problem does not represent an alternative to doing so. If there are no shortcuts to demarcating science from epistemic junk, or law from other claims to normative ordering, then this new sceptical position still leaves us with questions about “well-founded” or “heuristically fruitful” beliefs, as Laudan notes. But, what are well-founded or heuristically fruitful beliefs about law? Leiter has staked out some ground for a possible answer to this question in claiming that the artefacticity of law is completely

¹⁵ Laudan, n13 125

¹⁶ Leiter, n11, 14

¹⁷ *ibid* 15

¹⁸ *ibid* 15

uncontroversial. Unfortunately the ground he has staked out, on closer scrutiny, proves to be barren soil.

5. Artefacts

What is an artefact? Here I will make some common sense observations and rely entirely on Risto Hilpinen¹⁹ as a philosophical source. Hilpinen traces the idea back to at least Aristotle who distinguished between natural objects and artificial objects – or objects that have an author. Hilpinen points out that animals have been found to fashion and use tools so authorship is not limited to human beings. Some animals construct items for specific purposes, such as wasps constructing storage vessels, and do so, at least it is conceived, wholly out of instinct, and so without intention, and, substituting usefulness for intention, these are sometimes called “animal artifacts.”²⁰ In the manufacture of goods there are the objects intended and the by-products – the latter of which, anthropologists also think of as artefacts. As to their ontology, artefacts, Hilpinen suggests, are of various types, or can be conceived of in various ways. As already noted, the authorial intention to create an object is one standard hallmark. So, “all works of art, including musical and literary works, should be called “artifacts” insofar as they have authors.”²¹ *How* objects present themselves in the material world is one possible parameter of description, so they might be “singular, concrete object[s] such as the Eiffel Tower, a type (a type of object) which has or can have many instances (for example, a paper clip...), an instance of a type (a particular paper clip), or an abstract object, for example, an artificial language.”²² Artefacts can be portable, or, like a rail tunnel, “a non-separable feature of an object which serves as its substrate or foundation.”²³ Hilpinen notes that, “[a]rtifacts are classified in different ways: on the basis of their form, the method of manufacture, material properties, style, their intended use, or on other grounds.”²⁴ He goes on to note other ways we might classify artefacts, such as through their modes of production or their intended purpose. Indeed, he notes, “[t]he study of artifacts ... is intrinsically evaluative, since viewing an object as an artifact means viewing it in the light of intentions and purposes.”²⁵ But take the last mentioned specific example, ie, an artificial language. Artificial languages are artefacts, but natural languages, according to Hilpinen are not. “Languages and words can be natural entities (without identifiable creators) or artifacts which have been intentionally designed for a specific purpose.”²⁶ So Esperanto, and C+, and even “New Norwegian”²⁷ are artefacts, but natural languages, like English, are, as the

¹⁹ Hilpinen, Risto, “Artifact”, The Stanford Encyclopedia of Philosophy (Winter 2011 Edition), Edward N. Zalta (ed.), URL = <<http://plato.stanford.edu/archives/win2011/entries/artifact/>>.

²⁰ *ibid*

²¹ *ibid*

²² *ibid*

²³ *ibid*

²⁴ *ibid*

²⁵ *ibid*

²⁶ *ibid*

²⁷ *ibid*. Clearly Esperanto is an artefact. I am sceptical, despite Hilpinen’s claim, that New Norwegian is an artefact. It seems to me to be a situation analogous to other natural languages which have institutionalized academies (such as French and Spanish) which create standards for official usage, including modernizing and regularizing spelling, grammatical standards, and even regulating the inclusion of new vocabulary. In the case of New Norwegian the hand of the academy is heavier in trying to create a mashup of dialects, not

phrase suggests, natural objects, that is, not artefacts. And, of course, human beings are also not artefacts, they are animals and part of the natural world.

Now, it seems to me that not just Leiter, but much modern jurisprudence, puts an awful lot of weight on the idea of artefact, artefacticity, artifice, artificiality or whatever we might want to call it. Law is something we make, and that makes understanding it special and radically different from understanding things we don't make. Nonsense! Distinguishing artefacts from natural objects is a perfectly fine commonsensical distinction, but when philosophers try to get it to do the sort of conceptual work Leiter (and many others) try to get it to do, without giving serious consideration to what this means, it turns into an awful conceptual muddle, and worse than useless. The English language and Western civilization are not artefacts because they do not have authors; they were not purpose-built by identifiable producers. But there are elements of each that were purpose-built by specific authors. Many word coinages, and many specific laws, institutions, buildings and works of art that are part of Western civilization also have authors. But the idea that in every case we could define the authorship, or that in every case there is a grand design to it all, beggars imagination. What about the Linux operating system? Certainly it is designed with a purpose,²⁸ though actually ascertaining authorship of any advanced version would likely be impossible – these Neurathian boat-builders²⁹ would have so many unknown names it would only be possible to call it an ever-rebuilt boat of no clear ownership or builder. How do we draw a line between all the complicated cases of artefacts and natural objects? More importantly, what conceivable theoretical work or goal could that accomplish? Leiter has laid to rest one unworkable distinction only to hang his hat on another; having set aside the notion that there might be a quick, easy and useful distinction between law and ethics (or as I would put it, law and other related normative systems), or in the case of epistemology, between science and quackery, Leiter now hopes, for purposes of knowing and theorizing, that there is a quick, easy and useful distinction in the observation that something is an artefact (or hermeneutic concept³⁰), rather than a natural kind object. There isn't, and so the idea of artefact cannot do the work Leiter wants it to do.

Now Leiter, and all those who agree with him, say that law is an artefact. Certainly individual pieces of legislation, or particular judicial decisions, can reasonably be understood as artefacts. And no doubt there is something to the idea that human activity produces the law with intention. But the same is true of the English language. If we are

unlike modern Italian. Despite these attempts to regulate the language they remain natural languages whose development is controlled by the community of language users and not by the academies.

²⁸ Its purpose is to make computer hardware function as a general computer, but, of course, a general computer has virtually infinite possible uses and purposes.

²⁹ The reference is, of course, to Neurath's boat, a metaphor for the problem of constructing knowledge and yet being tied to our pre-existing natural languages and the existing body of knowledge we already have. "We are like sailors who on the open sea must reconstruct their ship but are never able to start afresh from the bottom. Where a beam is taken away a new one must at once be put there, and for this the rest of the ship is used as support. In this way, by using the old beams and driftwood the ship can be shaped entirely anew, but only by gradual reconstruction." Otto Neurath, *Empiricism and Sociology*, eds., M. Neurath and R. Cohen, trans., P Foulkes and M Neurath, D. Reidel Publishing, Boston, (1973), 199

³⁰ The role of the idea of "hermeneutic concepts" in this type of account of law is explored more fully below in section 8.

interested in understanding the realities of the world, then it makes more sense to think of law as being like the English language, that is, more like a natural object (though humanly created). Developing a story of the difficulty of making a useful distinction of artefacts from natural objects could take me down the road of animal learning and culture – things which human prejudice has generally, and wrongly, dismissed as nonsense.

6. Epistemology after the Death of Demarcation

When Laudan puts the demarcation problem in the philosophy of science to bed he still thinks that we are left with important questions about epistemically serious investigation versus quackery.

Insofar as our concern is to protect ourselves and our fellows from the cardinal sin of believing what we wish were so rather than what there is substantial evidence for (and surely that is what most forms of ‘quackery’ come down to), then our focus should be squarely on the empirical and conceptual credentials for claims about the world. The ‘scientific’ status of those claims is altogether irrelevant.³¹

We use the word “science” as an honorific. It does not have a definite meaning but is merely an eponym attached to what demarcationists thought might be a definable terrain, namely beliefs about the world for which there are good “empirical and conceptual credentials”, that is beliefs that are epistemically good or have objective doxastic quality. The project of finding a shortcut to the determination of objective doxastic quality was not to be found, but Laudan still thinks that there is such a thing. He doesn’t like the word “science,” for some of the same reasons I don’t like the word “law,” but neither is going away anytime soon.³²

7. Empirical Legal Theorists and Border Guards: Scientific versus Definitional Approaches to Theorizing “Law” and the Question of Scope

The degree to which legal phenomena are amenable to scientific investigation is a key difference in theoretical perspective between positivists and empirical legal theorists. Some authors, such as Raz and Tamanaha, have insisted that law is absolutely not amenable to scientific investigation. Brian Leiter, on the other hand, in earlier work, has argued for what he calls a naturalized jurisprudence.³³ Leiter looks to American Legal Realism (ALR) as a mode of scientific investigation of the real world functioning of legal institutions and norm generation. Unfortunately Leiter, in what has become a popular

³¹ Laudan, n13 125

³² While it certainly (and importantly) remains true that some investigative work is serious and other work not, it is the intimate facts about the gathering of evidence and reasoning that matters – and not the name attached to what is conceived to be a precise method or result. Though there is no a priori way to know whether some specific body of research is epistemically serious, whether we might want to use the epistemic honorific and call it “science,” it will always continue to be important to analyze the merits of claims to knowledge. Using an ever-developing set of tools we analyze particular claims to new knowledge to carefully consider their merit.

³³ Brian Leiter, *Naturalizing Jurisprudence*, Oxford UP 2007

misconception, represents American legal realism as a theory of adjudication rather than a functional account of law. As William Twining notes:

Brian Leiter uses his version of ‘naturalism’ to reinterpret American Legal Realism. We agree that Realism was caricatured by Hart and others, that most Realist views are compatible with positivism, and that there should be a close connection between conceptual analysis and empirical enquiry, with which we are both sympathetic. But Leiter’s account is historically skewed in that he treats American Legal Realism as a theory about adjudication and reasoning about disputed questions of law, omitting entirely, for example, Frank’s concern with questions of fact, the empirical studies of Moore at Yale and Oliphant and others at Johns Hopkins, Llewellyn’s ‘law jobs’ theory, and other extra-judicial studies of law-related behaviour – in short, some of the most original and interesting products of the Realist Movement. It is odd to call an almost exclusive focus on judicial reasoning in hard (typically appellate) cases realistic.³⁴

Twining looks to American legal realism for an account of law as something that “naturally” emerges out of the realities of groups of people trying to preserve their existence as groups. This sort of view of law, as a naturally occurring phenomenon within complex social groups, is the hallmark of ELT.

Brian Tamanaha, in, ‘An Analytical Map of Social Scientific Approaches to the Concept of Law,’³⁵ undertakes a fairly comprehensive review of the twentieth century’s history of social scientific accounts of law. This review seems to be mostly an effort to prove that these accounts must surely fail, because they are inadequate to the task of distinguishing law, properly understood, from other phenomena that are structurally-functionally related – or what I would call conceptual border patrol. His analysis is rooted in a distinction he draws between “two fundamental categories of the concept of law.”³⁶ “The first category [the social scientific view,] sees law in terms of actual patterns of behaviour; the second category sees law in terms of the state law model.”³⁷ He argues throughout that the social scientific account either becomes too vague and all-encompassing of socially normative activities, or, conversely, is completely conceptually dependent on the state law model. But this is only true to the extent that the socio-legal scholars he looks to share his emphasis on conceptual border patrol – and many of them don’t. In the middle of his argument he looks to Donald Black, in “The Boundaries of Legal Sociology,”³⁸ as someone who understands science but who does not understand the inability of science to investigate “law.” Tamanaha writes:

Pound's view of law is represented today in the work of Donald Black, who sets his analysis in a more sophisticated scientific framework. Black believes that

³⁴ William Twining, *General Jurisprudence*, Cambridge UP, 2009, 55 (in note 132)

³⁵ Brian Tamanaha, ‘An Analytical Map of Social Scientific Approaches to the Concept of Law,’ 15 *OJLS* 4, (1995) 501-535

³⁶ *ibid* 503

³⁷ *ibid* 503

³⁸ D Black, ‘The Boundaries of Legal Sociology,’ 81 *Yale LJ* 1086 (1971-72) 1092

‘science can know only phenomena and never essences’³⁹; he concluded that ‘the quest for the one correct concept of law or for anything else “distinctively legal” is therefore inherently unscientific’⁴⁰. From this standpoint the question *what is law?* was not an analytical one; rather, it was just a matter of designating the phenomenon to be studied by legal sociologists. Thus Black simply stipulated that ‘law is governmental social control’⁴¹, thereby sidestepping the entire debate.⁴²

But Tamanaha is simply misrepresenting Black here. Black writes, “I like to define law simply as *governmental social control*. This is one possibility among many consistent with a positivist [ie, scientific] strategy.”⁴³ And a bit further on: “Ultimately a theory is known and judged by its statements about the world. These statements both guide and follow empirical research.”⁴⁴ Rather than sidestepping the debate, as Tamanaha suggests, Black has grasped the problem with more clarity than Tamanaha. Black understands that theory is useful insofar as it facilitates empirical research and that these two must interact. Thus any “definition” of law that one deploys in such an exercise is always heuristic – it is a tool in a scientific enterprise, not a hill to be defended in an ideological battle. He clearly intends his brief functional description of “governmental social control” to function in precisely this sort of way.

Tamanaha, on the other hand, seems to believe that conceptual reification is simply of the essence of the legal theoretical project.⁴⁵ He returns to Black at the end of the essay, more

³⁹ *ibid* 1092

⁴⁰ *ibid* 1092

⁴¹ D Black, *The Behaviour of Law*, Academic Press, 1975, 2. Tamanaha cites, as just noted, to *The Behaviour of Law*; the same text occurs in *ibid* 1096

⁴² Tamanaha, n35 510

⁴³ Black, n38 1096

⁴⁴ *ibid* 1097

⁴⁵ Brian Tamanaha suggests a simpler route to conceptual reification and the exclusion of other objects from the legal philosopher’s purview. “A theorist who offers a conception of law in effect re-describes—usually in more abstract (scientific or philosophical) terms—what the theorist takes to be the model of law (B Tamanaha, “Law,” St. John’s Legal Studies Research Paper No. 08-0095, Available at SSRN: <http://ssrn.com/abstract=1082436> (2008), 2-3. Or, elsewhere, more strikingly, he writes: “To identify the basic elements of law, to describe the nature of law, to formulate a concept of law, to answer What is law?—a theorist must begin by first stipulating what law is. Conceptual analysis of law is unavoidably circular. Without a paradigm example of law to work from, a theorist cannot discern the elements or nature or concept of law.” (B Tamanaha, “What Legal Philosophers can learn from Non-philosophers About the Concept of Law,” presented at the Osgoode legal philosophy series April 2009, 13). In the first quote Tamanaha suggests that what legal philosophers in fact do is hold up an exemplar and describe that exemplar as containing the nature of law. In this I think he is mostly right, though I have tried to suggest a route to the problem of conceptual reification, mistaken as such a move may be, that is, nonetheless, more methodologically innocent. In the second quote Tamanaha suggests that the problem arises in the nature of the endeavour. A key point of my argument in this paper is that not only is this not the case, but that in acting more like scientists, legal philosophers can solve this problem. Tamanaha has attempted to find a concept of law that will function within general jurisprudence, but his efforts have consistently foundered on this methodological issue until he seems now to have given up on the idea. In “The Folly of the ‘Social Scientific’ Concept of Legal Pluralism,” 20 *Journal of Law and Society* 2 (1993) Tamanaha argues that the social scientific concept of legal pluralism fails because it does not distinguish between law and non-law – his criticism is aimed at the idea of a social scientific concept of legal pluralism broadly, but he holds up J Griffiths, “What is Legal Pluralism?,” 24 *Journal of Legal Pluralism*, (1986), 1, as the exemplar of the

blatantly misrepresenting him to create a straw man. But beyond that Tamanaha gets close to acknowledging the good sense that Black's position makes, though still obsessing about vocabulary. "Black should have just said 'governmental social control' is an important phenomenon which must be studied."⁴⁶ Of course, this is what Black did say, without asserting that such a phenomenon was the "essence" of law. Further on Tamanaha notes that the term law is,

... conventionally applied to a variety of multifaceted, multifunctional phenomena: natural law, international law, primitive law, religious law, customary law, state law, folk law, people's law, and indigenous law on the general level, and an almost infinite variety on the specific level, from the state law of Massachusetts to the law of the Barotse, from the law of Nazi Germany to the Nuremberg trials. If there is a shared trait to the various phenomena which carry the tag 'law', it's that they all lay claim to legitimate authority, to rightful power. This quality more than anything else is what makes law – in all of its many incarnations – so potentially dangerous. This study will certainly be facilitated by the construction of comparative frameworks like 'institutionalized norm enforcement,' as long as these frameworks are not then taken to be law. Unfortunately, the increasingly popular concept of legal pluralism is grounded upon precisely this error, and revives all of the old problems surrounding the social scientific concept of law.⁴⁷

But Tamanaha's approach, like all definitional approaches, is ultimately question begging – this is law because I, or we, call it law. Sometimes such forms of question begging are inevitable and unproblematic, when they are limited. But my concern, like Black's, is not a definitional concern around the word "law," but rather a concern with the conceptual arena within which the investigation of a range of structurally-functionally related social phenomena occur, ie, with precisely such things as "institutionalized norm enforcement." If the word "law" is to have any generalized utility, as typically conceived of in general jurisprudence projects, it has to be by means of such understandings of real world phenomena that have particular shapes and functions in societies.

Unfortunately the general tenor of the border guards seems to be that there is something improper or untoward about associating and trying to understand a range of phenomena that includes what they understand by law along with other related phenomena. But the

position. While some of his criticisms are well aimed his argument at its core rests on this same issue. In B Tamanaha, *General Jurisprudence*, OUP (2001) he searches for a cross-cultural concept of law in natural language. He suggests that we go around to different legal cultures and find out what these different cultures understand law to be by making natural language inquiries into the word they use for law. He says: "Law is whatever people identify and treat through their social practices as 'law' (or recht, or droit, etc.) (194)." W Twining, "A Post-Westphalian Conception of Law,"³⁷ *Law and Society Review* 1, 199 (2003) argues, and he is absolutely right, that Tamanaha's "labelling test" (223) is unworkable. One key reason is that there are serious problems with natural language translation. But this links up importantly with the issue of the distinction between folk and analytic concepts in legal anthropology (229). Ultimately we are interested in an analytic concept that relates to a particular set of social structures and functions (across different cultures) independent of how those are mapped out by the local folk.

⁴⁶ Tamanaha, n35 534

⁴⁷ *ibid* 535

real impropriety arises when one tries to account for “legal” phenomena to the exclusion of related phenomena. *In extremis* this would amount to being unwilling to venture into any normative discussion of what the law related to some issue *should* be.

I teach a course in law and globalization. The realities of inter-jurisdictional competition and mobile capital underpin the analysis of almost all the real world problems we discuss in that class. These realities mean that imagining shaping law to create a better world runs up against the rough edge of governmental and legal impotence. Thinking beyond the strictures of the definitional approach to law is the only way such a course can have any real content, which does not mean there is something wrong with the course or its location in a law school. It does mean that when we look to the world and the jobs law is, or should be, doing we find a range of forces that (sometimes) coincide with a range of normative orders.⁴⁸

8. Raz on the Artificiality of Law – Hermeneutic Concepts

Raz shares Leiter’s position on the non-naturalness of law, and hence its special epistemic status. He says, “[I]t would be wrong to conclude, as D. Lyons has done, that one judges the success of an analysis of the concept of law by its theoretical sociological fruitfulness. To do so is to miss the point that, unlike concepts like ‘mass’ or ‘electron’, ‘the law’ is a concept used by people to understand themselves.”⁴⁹ Leiter takes note of this position of Raz’s and understands it as a claim that “the law” is a “hermeneutic concept.”⁵⁰ Raz is clearly distinguishing concepts about things in the natural world from this different kind of concept, and relating this to the way such things might be known. Raz (and Leiter) want the idea of a “hermeneutic concept” to do similar work to that which Leiter imagines for artefact concept, viz., to create a special epistemic status for law (or anything else to which these terms appropriately apply). As with the idea that describing “law” as an artefact concept explains its special epistemic status, the idea that “law” is a hermeneutic concept hangs more on a common sense idea than that idea can sustain.

In unpacking Raz’s idea Leiter is careful to note that there are lots of natural kind concepts – precisely the sorts of things to which Raz has pointed, viz., electrons, for instance – that play “hermeneutic roles: “gold” in bourgeois societies ... “water” in many religious baptismal rituals, or “wolverine” in Michigan... Yet none of this makes these concepts Hermeneutic Concepts, because we do not take their extension to be fixed by the hermeneutic roles they do or might play... ”⁵¹ Leiter says that Hart argues that we must treat “law” as a hermeneutic concept, otherwise, “... we will not be able to

⁴⁸ See, for instance, R Cotterrell, “Transnational Communities and the Concept of Law,” 21 *Ratio Juris* 1 (2008), 1-18 and W Twining, *General Jurisprudence: Understanding Law from a Global Perspective*, Cambridge UP (2008).

⁴⁹ J Raz, *Ethics in the Public Domain*, Clarendon (1995) 237, referencing David Lyons, *Ethics and the Rule of Law*, Cambridge UP, (1984) 57-59. Lyons argues that we should approach law with precisely the sort of scientific perspective I am suggesting.

⁵⁰ “Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence,” in Leiter n33, 172-3.

⁵¹ *ibid* 173

distinguish its extension from that of habitual social practices... .”⁵² Elsewhere in the essay he describes this as Hart accepting the “hermeneutic constraint on accounts of social phenomena: to wit, that an adequate description of a human social practice must attend to how the participants in the practice understand its meaning and purpose.”⁵³ So, according to Leiter’s interpretation of Raz, the extension of law, the real-world application of the term, is fixed by coming to understand what those who function within the system understand its extension to be. We might call this epistemic hard internalism – the idea that it is only from the internal point of view that the object can be known. Priests engaged in baptisms have an internal description of the hermeneutics of “water,” it says things like the water cleanses the soul, it initiates the child into the community of faith, or what have you, but there is an external description of water beyond the priest’s account which is its physical description, H₂O, and all the myriad things that entails beyond its role in baptisms. The hermeneutic account of water is partial; water is importantly and requisitely understood in non-hermeneutic ways, in ways that are quite beyond its role in our understanding of our rituals. But, according to Leiter, “law” is not a natural thing (described by a natural kind concept) that plays a hermeneutic role, but rather it is an artificial thing whose entire extension is circumscribed by its hermeneutic role. If we understand the hermeneutics of “law,” if we understand what role it plays in shaping the meaning of the lives of those who accept and live within it, then we understand all there is to understand about law.

Leiter (and Raz’s) idea, then, relies at least in part on the claim of the artificiality of law, which I have already addressed. This is another twist, in which it is the role the concept plays in a self-explanatory story, that distinguishes it from other concepts and gives it a special epistemic status. But the hermeneutic role that “law” plays is just like that of “water” in the baptism ritual. Just as a priest, with no contradiction, can be a chemist, so too can a lawyer, judge or legal theorist, with no contradiction, be an anthropologist. Leiter suggests that if we take the external point of view we will fail to distinguish law from other law-like phenomena. Now, while using the internal point of view is one useful way to gain insights into the object in question, the idea that it is necessarily exhaustive of the potential modes of understanding is wrongheaded. The internal and external points of view are complimentary to each other. A single knower trying to understand a single example of a social phenomenon, such as law, can usefully switch between internal and external points of view. The idea that trying to understand law must be limited to the internal point of view otherwise we will fail to distinguish “law” from “habitual social practices”, that is, that we must restrict our epistemic tools or we will be led astray, is wrong.⁵⁴ I will revisit the issue of epistemic points of view in more detail below.

⁵² *ibid* 173

⁵³ *ibid* 166

⁵⁴ Leiter is pointing to Hart for the idea that we must distinguish law from habitual social practices. In some sense this must be true, but only in a trivial way, that is in a way that doesn’t add important information to our understanding. So, when people in the village always walk from the church to the central square after religious celebration where they then feast, is it the law that requires the walking along that path? The epistemic hard internalist position would seem to suggest that an externalist would say that since it is always done, then it must be the law. But if it is always done because there is always a community feast after religious rituals and they always take place in the village square and that path is the shortest route, then there is a trivial practical reason why this is always done. All ELT versions suggest that there must be

For the moment let me try to unpack a little more carefully the idea of a hermeneutic concept. For Raz and Leiter a hermeneutic concept is a concept we use to understand ourselves, like culture. But to say that we use such terms to understand ourselves does not mean that they render normal investigation using normal epistemic standards into the reality of the phenomena in question impossible. When we refer to culture we might use it in vague and amorphous ways to start with, referring generally to Spanish culture, for instance. But to say that the Spanish have a culture, or to attribute something to being a characteristic or product of Spanish culture does not mean that it is incapable of further investigation. We might use the term in general ways, but unless it cashes out with greater specificity then it does not help us understand ourselves, or others, it merely obfuscates. Surely by suggesting that there is something distinctive about Spanish culture we mean there are myriad distinctive patterns of behaviour – kinds of music, dance, food, styles of architecture, habits around meals and conversation, eating late and staying up half the night, sleeping in the afternoon, etc. And, no doubt, if I want to understand Spanish culture really well I would do so best by immersing myself to the point that I speak, live and dream like a Spaniard, to the point that when I cross the border to France with my Spanish friends I am mistaken for one of the loud Latin neighbours. But even if I do all this it does not negate the reality that there is much about Spanish culture that is objectively describable and knowable. And, if my project of complete absorption into *lo español* is successful, still, by the mere fact that my non-Spanish identity is not completely absorbed, I might have insights into Spanish culture via my external point of view that the Spaniard herself does not see, can not see.⁵⁵

Raz seems to be suggesting that social phenomena are not subject to scientific investigation, but he is wrong, they are, and the vocabulary we use in that science, like all scientific vocabulary, must adjust to new meanings as the science develops. The claim by positivists that the thing they describe is law, and what social scientists investigate is a range of phenomena with some shared properties with law, but it isn't law, is not a reasonable way to decide who "owns" the term "law".

9. Understanding the Phenomenal World with Concepts – Moving Beyond Definition

norms understood as obligatory and conjoined to enforcement for something to be law, and to argue otherwise is attacking a straw man. If people follow this pattern because of obligatory enforced norms then it meets the basic test. Perhaps the hard internalist claim is that it is only possible to know about the normative content by assuming the internal POV, but this is also wrong. I can discern the existence of a norm within a community from a wholly external POV. There are lots of other questions we might start to ask about such laws and the social institutions that make them work, or make them valid, but many other questions we might want to know the answers to will not call into question that the system is law unless we discard the social and separation theses.

⁵⁵ Or consider a perhaps more practical use of the idea of culture. When a business analyst refers to a cultural problem within a company s/he means that there is a set of habits, attitudes, mores that have become common amongst some or all of the people who make up the company. If new management is brought in to fix the culture of the company then they are trying to get people in the company to change specific habits, attitudes and mores. A hermeneutic concept can only function hermeneutically insofar as it has some real specific content, which is discoverable in the normal ways, using normal epistemic standards.

For those willing to move beyond this concern for conceptual border patrol (or at least view it as merely secondary) it seems to correlate with a rise of either agnosticism or despair about a unified concept of law. But a unified concept of law is both possible and needed. An account of law that sees it as a naturally occurring phenomenon of human societies offers that possibility. Every society has norms and institutionalized enforcement mechanisms. A structural-functional description of the common elements of these phenomena, that is sufficiently heuristic to adapt as it is used, is what ELT puts forth, and satisfies the need for a common concept. Such a concept should be driven and measured by epistemic utility and fruitfulness.

Such an approach suggests evaluative criteria and methods distinct from much legal philosophy. By taking up a scientific perspective wherein the value of concepts is in their capacity to help us understand the world, we invert a typical analytic strategy, which I call the definitional approach. The typical strategy is as follows: I take my intuitive/inchoate concept of law into the world and see what I find. Based on this encounter between initial concept and the world I refine my concept and make clarifications, including distinctions between my concept and related but different concepts. I define and refine. This definitional approach leads to conceptual reification.⁵⁶ Law is X. There may be other things that are related to X in various ways, but these are not my objects of study.

The scientific strategy necessarily begins in the same place with an encounter between my intuitive/inchoate concepts and the world they are intended to describe, but as a scientist I am interested in understanding the world as best I can. That is, I see the value or truth of concepts as lying in their ability to facilitate an understanding of all of the inter-related phenomena of the world.⁵⁷ Scientists spend most of their time digging deeper and not wider – but there are no artificial limits to the scope of inquiry – as there frequently are within many accounts of the concept of law. From this perspective, a focus on drawing distinctions between true or real law, and other law-like phenomena, is both uninteresting and mistaken. There is a range of phenomena, between different societies and within any given society, that function in law-like ways. From a scientific point of view these are all valuable objects of study, and insofar as understanding these phenomena together casts more light on the way the world works, (which it does), then having a conceptual apparatus that encompasses this range of phenomena is the right way to proceed.

For many legal philosophers my suggestion that there is a range of law-like phenomena is completely unproblematic, yet they remain insistent on distinguishing “law-like” phenomena from “law.” A fairly standard line from the border guards is that failing to engage in border guard work simply allows the conceptual waters to be muddied. They see theories that would broaden the scope of investigation as conflating different issues, and opt instead for an artificial clarity, preferring arbitrariness to conflation. This is a mistake. Picking one concept of law, generally state law, as the standard-bearer of the

⁵⁶ See n45 (above) on conceptual reification

⁵⁷ “Truth” is used here in the sense it is used by pragmatists – concepts are true insofar as they fit coherently with a description of the world and further our investigative attempts to understand the world.

moniker “law” to the exclusion of all else is problematic for knowledge reasons, just as it would be to pick out the practices of experimental physicists and call this “science,” to the exclusion of all other practices, because the term “law” just like “science” is an honorific. At least with the term “science” there is fairly general clarity about how the honorific is intended to function, what good things make the use of the term apply, namely, high epistemic quality, or objective doxastic virtue, generally related to quantifiable aspects of the phenomenal world whose method of determination is well described and repeatable. In the case of the honorific “law” there is a great deal more confusion about what the supposed goodness referred to is. The long running disagreement between natural lawyers and legal positivists seems to have spread a generalized confusion amongst the average citizen, and many in the legal community as well. The muddled view that law somehow aims towards the good, and is at the same time fundamentally a tool of political elites, and of each element of this muddled view that it is both true and false, seems to be the most widely diffused view (insofar as we can call that a “view”) about what is “good” about the law. And, nonetheless, the word comes charged with connotations of power and legitimacy.⁵⁸ The term law is both damaged and yet remains invaluable. It would be better if it were not used as an honorific, but this is likely to continue to be the case for the foreseeable future. The only reasonable solution is to refine the vocabulary we use as we clarify the range of law-like phenomena in the world. What I foresee is a range of related phenomena of which no single one will be able to claim the unique name of law. “Law” then, will be the family name of a group of related phenomena whose various members will have different names, which needn’t necessarily include the surname, that is, we might speak of some member of the family without calling it law.

10. Naturalization, Epistemic Seriousness and Empirical Legal Theory

A more precise vocabulary for discussing the range of law-related phenomena will only be achieved by examining and describing such phenomena as what they actually are. Brian Leiter has frequently invoked the idea of epistemic naturalization as a way of distinguishing epistemically serious efforts to understand law from hokum. As I have already suggested I have great sympathy for this part of his work.

First, I think it is important to clarify what Leiter means by naturalization, as there is some ambiguity about the term. There is a significant body of philosophical work on epistemic naturalization originating with WVO Quine that explores the nature of the project of epistemology generally, the viability of foundations theory, and the connection between the project of epistemology and the project of the sciences.⁵⁹ There is also

⁵⁸ I am not alone in thinking “law” an honorific term. See, for instance, R Cover, “The Folktales of Justice: Tales of Jurisdiction,” 14 *Capital University LR* 179 (1985) 179-180 where he discusses the reality that both “science” and “law” are invoked as honorific terms, where each is “freighted with normative significance.” Indeed, that the word “law” is honorific is widely understood. See also, for instance, D Regan, “Law’s Halo,” n 4.

⁵⁹ A serious discussion of epistemological naturalization, the motives and goals of the program, and the controversies it generates, is beyond the scope of this paper, much less this footnote. Nonetheless, a brief comment is warranted. Epistemology is the study of knowledge. Knowledge is generally understood to be justified true belief. Much epistemology, then, turns on the question of when we are justified in holding

some belief. Early twentieth century epistemology turned increasingly towards these normative questions of justification from an a priori perspective. Naturalization is a response to this emphasis on the a priori. WVO Quine, at least early on, argues for naturalizing epistemology in the sense of eliminating the normative question of the justification of beliefs, (see his “Epistemology Naturalized” in W Quine, *Ontological Relativity and Other Essays*, Columbia UP (1969).) The question for the early Quine is not what beliefs we are justified in having, but rather what the causal connection between sense experience and beliefs is. (In a sense he is externalizing the justification question – looking to the sciences for a set of beliefs whose worthiness of being held is established by their utility in the scientific project and the results they provide in predicting things about the world. He then wants to be scientific in figuring out how these beliefs are arrived at.) How in fact do we come to have the beliefs that we have? This radical program faces pointed criticism on several fronts. Jaegwon Kim, (What is Naturalized Epistemology?, *Philosophical Perspectives*, Vol.2, Epistemology 381 (1988)) argues that the question of the causal connections between sense data experience and theoretical beliefs leaves open the normative questions about the value of those beliefs and theories, and so the eliminative program might have merit as a research program, but is a different project from normative epistemology. The more modest proposal for naturalizing epistemology is simply that we should conceive of epistemology as sharing its extension with science. Epistemology should not be thought of as somehow logically anterior to the rest of the sciences, but only a more abstract portion of general scientific investigation. This cashes out in two primary ways. First, we should focus on knowledge as a psychological phenomenon. Since knowing is a human activity a naturalized epistemology continually bears in mind the capacities and limitations of human beings. Ought implies can, and so practical epistemological issues relate to the ways in which the cognitive architecture built into the human animal works. This closely connects to the second point, namely, the ongoing interaction with empirical investigation. Since epistemology is part and parcel of a wider scientific project of investigating the world, what we learn about the contingent realities of human psychology will impact our understanding of the project of knowledge generally. For instance, investigation into various kinds of perception bias can be an invaluable empirical input into a naturalized epistemology. The feedback between empirical investigation and the normative discipline of epistemology is akin to the methodological issue around legal theory I discussed above in “Understanding the Phenomenal World with Concepts.” Whereas legal theorists tend to confirm the correspondence of an inchoate definition of law with some phenomena in the world, and then close the feedback mechanism as they attempt to clarify their understanding of law based on that definition, I argue that a more fruitful mode of procedure would be to keep the feedback mechanism open. We should try to understand a range of related phenomena in the world, and our understanding of what phenomena we are exploring or trying to understand should not be based simply on a definition, but rather on ongoing feedback between what we observe in the world and our conceptual account. M Steup provides a useful and succinct account of the terrain, (Steup, Matthias, “Epistemology”, *The Stanford Encyclopedia of Philosophy* (Winter 2013 Edition), Edward N. Zalta (ed.), URL = <<http://plato.stanford.edu/archives/win2013/entries/epistemology/>>). R Feldman, “Naturalized Epistemology” is a good introduction to the ideas and controversies of naturalization in epistemology, (Feldman, Richard, “Naturalized Epistemology”, *The Stanford Encyclopedia of Philosophy* (Summer 2012 Edition), Edward N. Zalta (ed.), URL = <<http://plato.stanford.edu/archives/sum2012/entries/epistemology-naturalized/>>). W Quine, *Ontological Relativity* (1969) (supra this note), is an important early work in the argument for naturalization in epistemology. See A Goldman, “Epistemics: The Regulative Theory of Cognition,” *The Journal of Philosophy*, Vol. 75, No. 10, 509 (1978) for a discussion of the uses of cognitive psychology in a naturalized epistemology. One key idea in Quine’s version of epistemic naturalization developed most centrally in “Two Dogmas of Empiricism,” 60 *Philosophical Review* 1 (1951) 20-43, is that our knowledge is rooted in a coherent network of beliefs, both theoretical beliefs and sense data beliefs, and none of these beliefs necessarily stand or fall on their own, though they may face pressure that requires adjustment to the network within which they reside. This description has attracted critiques related to the idea that all our beliefs are only grounded in other beliefs, or that there is only a circle of belief. Kim suggests that the “supervenience of value upon fact” (400) grounds the very possibility of normative epistemology. On the point of supervenience see Ernest Sosa, “The Foundations of Foundationalism,” *Nous*, 14 (1980), 547-64, esp. at 551, and James Van Cleve, “Epistemic Supervenience and the Circle of Belief,” *The Monist* 68 (1985), 90-104, esp. at 97-99. The reality of supervenience does not completely undermine Quine’s larger project. These arguments do a good job of refuting the claim that there exists only a circle of belief and that there are some beliefs whose existence relies on something other

another fairly common usage of the term that is not entirely unrelated to the issues at hand, but that sidesteps some of the technical arguments between various positions taken by proponents of epistemological naturalization and its critics. By this common usage “naturalization” (sometimes “naturalism”) is shorthand for the position that the sciences and their methods represent the hallmark of epistemically serious treatment of the phenomenal world. This soft naturalization position sidesteps the technical controversies alluded to in the previous footnote, so much so that opponents in those arguments are unlikely to take issue with this soft position. Leiter says of this version of naturalization that it

... means taking seriously the epistemological and metaphysical consequences of the practical and, then, theoretical triumph of the sciences as our most reliable guide to what we can know and what there is. As Quine famously put it, “science is self-conscious common sense,”⁶⁰ which is to say that the epistemic standards of the sciences are merely formal extensions of the standards of evidence and justification that all of us employ all the time: we are all practical naturalists, and the only question is whether we are prepared to follow out the import of the epistemic norms that make human life possible. ... the methodological commitment at the core of naturalism ... [is] to defer to whatever ontology and epistemology falls out of successful scientific practice.⁶¹

than merely other beliefs – typically sense data, unlike the paradigmatic foundationalist theory in which the foundational belief is bare self-awareness in the form of the cogito. Suggesting that this functions as a refutation of Quine’s general argument does not fly. Van Cleve suggests in the same essay that Quine himself points to the inputs of sense data as foundational (94), which he does. More importantly, Quine’s argument about the way in which both theoretical and sense data beliefs are woven together in a web, especially as that argument is laid out in “Two Dogmas of Empiricism,” (supra) functions at a higher level of complexity than the positions easily refuted by the supervenience argument set forth in Sosa and Van Cleve. Quine’s argument both informs and is further developed by Thomas Kuhn’s description of the development of the scientific project as set out in *The Structure of Scientific Revolutions*, U of Chicago (1962). The complex theoretical descriptions of the world set forth in scientific theory do not simply bang up against single pieces of sense data and meet their downfall. Indeed, theoretical beliefs have important impacts on what sense data experience are available – there is a theory-ladenness of perception – one of many important points about the psychological realities of human knowers that impact the shape of epistemology. Chris Swoyer offers a useful introduction to the topic in his, “Relativism and the Constructive Aspects of Perception,” (at <http://plato.stanford.edu/entries/relativism/supplement1.html>) which is a supplement to his “Relativism,” entry in the Stanford Encyclopedia of Philosophy (Swoyer, Chris, “Relativism”, *The Stanford Encyclopedia of Philosophy* (Spring 2014 Edition), Edward N. Zalta (ed.), URL = <<http://plato.stanford.edu/archives/spr2014/entries/relativism/>>.) What’s more, the sort of coherentist conception of beliefs that Quine argues for is not contradicted by foundationalism, or as Sosa would argue, at least not by “formal foundationalism (549).” Supervenience is just simply the idea that evaluative properties supervene on non-evaluative properties; if an apple is a good apple (evaluative) it is so because it possesses certain non-evaluative properties, it is “sweet, juicy, large, etc., (551)” to use Sosa’s example. Now, whether the suggestion that supervenience supports the possibility of foundations theory – and also undermines naturalization – depends on what we mean, at least, by naturalization. Quite simply, the reality of supervenience tends to cut both ways. It suggests that some form of foundationalism is possible, but at the same time undermines claims of a radical fact-value distinction such as Hume seemed to maintain. I will revisit supervenience below.

⁶⁰ W Quine, *Word and Object*, MIT Press, (1960), 3

⁶¹ n33, 3-4

This quote comes from the introduction to a book which is a collection of essays that connects American legal realists with this sort of naturalization project. In a later essay he writes:

The Legal Realists thought that the task of legal theory was to identify and describe – *not* justify – the patterns of court decisions; the social sciences – or at least social-scientific-type inquiries – were to be the tool for carrying out this non-normative task. There is a sense, then, in which we may think of the jurisprudence of adjudication the Realists advocated as a naturalized jurisprudence on the model of something like Quine’s naturalized epistemology. Just as a naturalized epistemology – in Quine’s famous formulation – “simply falls into place as a chapter of psychology”⁶² as “a purely descriptive, causal-nomological science of human cognition,”⁶³ so too a naturalized jurisprudence for the Realists is an essentially descriptive theory of the causal connections between underlying situation-types and actual decisions.⁶⁴

Leiter goes on to argue that the reason for naturalization in each instance is a recognition of the failure of the normative project. Thus, “the Realists can be read as advocating an empirical theory of adjudication precisely because they think the traditional jurisprudential project of trying to show decisions to be justified on the basis of legal rules and reasons is a failure.”⁶⁵ This is the fairly standard point about the realists that they understood law generally to be indeterminate and best understood by looking beyond the law itself.⁶⁶ When this work is focused on judicial decision-making the realists are frequently described as taking the position that the law is whatever the judge says it is on decision day. The reality that court decisions may not be determined by a combination of the law and the facts of the case, but rather by other matters, is indeed realistic, and it seems difficult to imagine a legal world in which such frank assessment of the existence of “external” inputs into judicial decision-making and the “law” was not present. A frequent criticism levelled at American legal realism as a contribution to general jurisprudence is the claim that the views articulated are fundamentally about prediction of court behaviours and not describing what the law is more generally. But this criticism is lumping a very diverse body of research together – some of which is indeed focused on predicting judicial decision making with a particular focus on extra-legal inputs – but other work which ventures far beyond this limited project.⁶⁷

⁶² W Quine, “Epistemology Naturalized” in *Ontological Relativity and Other Essays*, Columbia UP (1969), 82

⁶³ J Kim, n59, 388

⁶⁴ B Leiter, “Naturalizing Jurisprudence: Three Approaches,” Public Law and Legal Theory Working Paper No. 246 – The Law School of the University of Chicago, online at <http://ssrn.com/abstract=1288643> (2008), 10

⁶⁵ *ibid* 11

⁶⁶ A seminal and oft-cited example of the Legal Realist approach is Felix Cohen’s “Transcendental Nonsense and the Functional Approach,” 35 *Columbia LR* 6, 809 (1935)

⁶⁷ Not that there is anything wrong with work that focuses on predicting judicial behaviour. Indeed it can be very important to engage in the critical work that attempts to lay bare what are the influences of judicial decision makers.

11. Empirical Legal Theory

Now, as I have already pointed out, Twining argues, and I agree, that the tendency to reduce all of ALR to a predictive theory of adjudication is a misconstrual of the broader project of ALR. Leiter is not alone in construing ALR this way. But the broader project of ALR fits in nicely with what I, following Cotterrell, am here calling empirical legal theory. ELT takes a scientific approach to understanding a feature common to virtually all societies: institutionalized obligatory norm enforcement that claims pre-eminence, or, law. That is, ELT takes a structural functional approach to understanding and exploring these phenomena.

Leiter, in “Demarcation Problem” advocates a new sceptical approach, that is, giving up on the project of defining the essence of law. Above I suggested that we need to distinguish between definition as the goal of a project, or determining the essence of law, and heuristic definitions that are required to be able to think about and focus on an object of investigation. I would expand on my just proffered seven word description of law, that is, “institutionalized obligatory norm enforcement that claims pre-eminence” in the following way: Human groupings (societies) have conventional norms and institutions that claim authority over the group; usually the most powerful and effective of these is recognizable both to those exercising the power and those subject to it (there may be overlap in these groups); such power is generally recognized with an honorific: “law” is the word in English. Yet, both the application of the honorific, and the exercise of power through norms and institutions, are always a matter of contention. Understanding legal phenomena involves understanding that terrain of contention.

Or, consider another heuristic description of a functional understanding of law, offered by Twining as a description of Llewellyn’s position: “The law-jobs theory was a central element of Llewellyn’s legal thought. It is grounded in the proposition that human groups have certain needs that must be met for the group to survive or pursue common goals. These needs are a source of actual or potential conflict. As conflict poses a threat to group survival, the prevention and resolution of conflict are essential for group survival and effectiveness.”⁶⁸ Law-jobs offers a functional description of the things that law does and is used as an anthropological description for identifying the legal institutions and legal norms of social groups that do not correspond to modern Western states. E. Adamson Hoebel offers another possibility. He writes, “... for working purposes law may be defined in these terms: A social norm is legal if its neglect or infraction is regularly met, in threat or in fact, by the application of physical force by an individual or group possessing the socially recognized privilege of so acting.”⁶⁹ Or, consider Malinowski’s very concise description: “Law is the specific result of the configuration of obligations, which makes it impossible for the native to shirk his responsibility without suffering for it in the future.”⁷⁰

⁶⁸ W Twining, “Talk about Realism,” 60 *NYU LR* 3 (1985) 329, 339 (in n22)

⁶⁹ EA Hoebel, *Law of Primitive Man*, Harvard UP, (1954), 28

⁷⁰ Malinowski, *Crime and Custom in Savage Society*, Littlefield Adams and Co., (1964), 59. Or again, L Pospisil, *Anthropology of Law: A Comparative Theory*, Harper and Row, (1971), suggests the following: “... law manifests itself in the form of a decision passed by a legal authority (council, chief, headman,

All of the foregoing “definitions” of law are structural, functional and heuristic. I put definition in scare quotes because of the heuristic or provisional nature of the descriptions of law that social scientists employ when they are deciding whether to classify various phenomena as “legal”; these are thinkers who are generally sceptical of the idea of law having an essence. Scepticism about defining the essential properties of law long predates Leiter. This basic sort of description was operative in the debate about the amenability of law to scientific investigation that I presented above. As Roger Cotterrell puts it: “There is ... a fundamental difference between a definition of law, which legislates the way we are to think of it and, in effect, terminates inquiry, and a model of law which is no more than a starting point for study, a peg on which to hang ideas, data and hypotheses. Open-minded inquiry requires merely provisional concepts.”⁷¹

12. Internal and External Points of View

One useful way to understand differences between ELT and legal positivism is between the emphasis on internal or external points of view (POVs). Herbert Hart, of course, emphasized the internal POV as the perspective that offered insight and understanding of the law. By his description the appropriate way to try to understand the law was to assume the internal POV, that is, the position of people who operate within the system, and in important respects, who make the system. Think of oneself as a lawyer or judge, and assume the perspective of belonging to, and sympathizing with, the institutions that this entails.

This contrasts neatly with the idea expressed by Oliver Wendell Holmes that the best way to understand the law is to assume the perspective of the “bad man”⁷² and to bathe one’s perspective in “cynical acid.”⁷³ When trying to understand the law the bad man asks no questions about what the right thing to do is, but merely what are the risks of legal sanction that he faces in trying to pursue his desired actions. Whether one counts Holmes as an early realist, or not, it is a perspective that strongly informs the realist project.

It is important to note, that there is no inherent connection between ontological claims about law and commitments to points of view. As I have already noted, points of view as I am describing them here, are epistemic heuristics. Anthropologists distinguish between internal and external points of view, or etics (external POV) and emics (internal POV), to use their technical vocabulary. If I can usefully try to understand the legal systems of existing states by assuming the internal pov, I can equally use this epistemic heuristic to understand law as described by ELT. There are many possible examples. Take one prominent example, the legal institutions described by Boaventura de Sousa Santos in a

judge, and the like), by which a dispute is solved, or a party is advised before any legally relevant behavior takes place, or by which approval is given to a previous solution of a dispute made by the participants before the dispute was brought to the attention of the authority. ... A decision serves not only to resolve a dispute ... but it also represents a precedent ... Thus the field of law consists of principles abstracted from the decisions of authorities (37).”

⁷¹ R Cotterrell, *Sociology of Law*, Butterworths, (1984), 41

⁷² OW Holmes, “The Path of the Law,” X *Harvard LR* 8, (1897) 457, 459 and elsewhere.

⁷³ *ibid* 462

Brazilian *favela* to fill various legal jobs in the vacuum left by the official institutions of the state, not exclusively, but most especially the law of land titles.⁷⁴ It matters not one iota that ELTs see in this example phenomena that have the hallmarks of law and positivists do not, I can still assume the internal POV in relationship to these phenomena and usefully learn important things about the phenomena from doing so.

13. Positive Law and Normativity

But one important difference between the different POVs is the take they are likely to produce on the normativity of law. Is law inherently normative, does it tell us what we ought to do? It seems almost silly to ask the question, but it is worth querying a little closer, especially given the way in which the idea of law's normativity is used by Raz (and Leiter) to reinforce the idea that law is a hermeneutic concept, only knowable from the internal point of view, and enjoying a special epistemic status.

The social and separation theses assert that positive law is a social product, valid based on its sources, and not on its moral worth. Austinian positivism dismisses the normativity of law by describing law as the commands of the sovereign.⁷⁵ But Hart and Raz are both interested in describing law as normative, even as they assert that it is a factually existing social phenomenon and morally inert. What are we to make of the puzzle of a morally inert normative system? In important respects the puzzle dissolves if we are both epistemically serious about the object in question, and give careful consideration to the structure of normativity. Now, of course, I will not resolve disputes about normativity and its reducibility here, but I will try to marshal evidence sufficient to call into question the strongest forms of the fact-value distinction, and as a consequence, call into question the way it is used to suggest that law is an epistemically special object. Here are three reasons to doubt the strong version of the fact-value distinction and the special epistemic status of normative systems.

Normative statements as conditionals/imperatives, strong fact-value distinction and free-floating goals

First, it is important to think about the fact-value distinction. In its strong form it suggests that there is an absolute distinction between facts and values; values are not reducible to facts, but are, rather, primitive or elemental. It is at least intuitively plausible that claims or statements about what ought to be done are members of a different class or category from statements about what is in fact the case. We can think of normative claims as structured as conditionals, or hypothetical imperatives, which only tell me what I should do given some other goal; it defines a means to an end. If I want to quench my thirst I should drink. "You shouldn't steal" can be rephrased as "if you want to be a good person (obey the law/avoid criminal sanction), you shouldn't steal." Now we might question the "normativity" of hypothetical conditionals on a couple of grounds. First, a merely

⁷⁴ Santos, Pasargada, n8, 5

⁷⁵ Or so it would seem anyway. Commands do not seem to have a normative structure, but this may be an issue of perspective and description. John Austin, *Providence of Jurisprudence Determined*, Cambridge UP, (1995 [1832])

hypothetical conditional, especially one that turns out to be counter-factual might really not be normative at all. For instance, “You should take the M3 to get to London from Southampton” doesn’t seem to tell me what I “ought” to do, if I don’t in fact want to go to London. Second, some uses of normative language are false friends, as language teachers sometimes say. For instance, “You should give me \$5,” sounds normative but frequently means the same as, “Give me \$5,” – it is an order or request. Perhaps then the truly normative, so this argument might go, are those things for which there is some objective value to the first part of the conditional. For instance, in epistemic norms: “if you want to have justified true beliefs (or, knowledge), then you should follow reliable procedures to produce them.” It might be possible to imagine a case in which a person does not want to know something, but producing knowledge is the epistemic project, and discussing its norms is not hypothetical, it is categorical. For epistemic purposes you should (categorically) follow procedures that produce true beliefs. But if the goal is some objective good then surely the differences about how to achieve the good are contingent factual questions about what methods are best, just as the question of the fastest way to London is. Now any imperative, even categorical imperatives, can be rephrased as conditionals, though in the case of the latter the good to be achieved will be seen as both objective and overriding.⁷⁶

Now, the most radical form of fact-value distinction is driven by Humean scepticism and its ilk. Hume understands the conditional structure of normative or value claims and conceives of the goal side of the conditional as structured by desire, which he conceives of as floating freely from reason. He writes, “’tis not contrary to reason to prefer the destruction of the whole world to the scratching of my finger.”⁷⁷ No need here to consider Hume’s emotivist ethics. Hume is suggesting that there is an unbridgeable chasm between the goals my desire sets and the reasoning I can call on as a tool to achieve those goals, but that “reason” is purely a slave to passion. For Hume then, goals, driven by emotions, are free-floating, (perhaps volitional), but unconstrained by reason. And, it is the nature of free-floating a-reasonable goals that drive the strong fact-value distinction for Hume. However, this sort of scepticism driving a strong fact-value distinction seems most relevant to the sorts of goals we are here least interested in – my itches and desires to go to London. There are, nonetheless, lots of other normative goals, like knowledge, where there is nothing free-floating at all about the goals. The goal is what the project is about, and if I am not trying to discover the means to the goal, then I am simply not engaged in the project. Now, if the goal is fixed, then while there might be arguments about the contingent facts of how to best achieve the goal, the dispute is, nonetheless about facts.

Points of view

Second, as already suggested, different epistemically heuristic POVs can have an important impact on whether one describes law as normative. One way to understand

⁷⁶ What I have here called conditionals might be more accurately called conditional imperatives. If you want x, then you should pursue means y. The command (or advice) to pursue a course of action is conditioned on the presence of the desire.

⁷⁷ D Hume, *A Treatise of Human Nature*, ed. LA Selby-Bigge, Clarendon, (1888 [1739]), 426

Raz's account of law as a hermeneutic concept knowable only from the internal point of view is to think of this as a way of trying to understand law as essentially normative and the internal POV as offering unique access to normative knowledge. But Raz's idea of how to know about the normativity of law and the idea of normativity itself merit closer examination here.

While Raz and Hart suggest that the internal POV is the position we need to assume to understand the normativity of law, it is equally possible to turn to the external POV. It is possible to observe the society of others with an eye to discerning the structure of social relations that guide the members of the society. And, viewing a society we are likely to discern that the people of this society make judgments about what both is and is not acceptable behaviour. Furthermore, even for societies with which we find ourselves in radical disagreement about their judgments on these matters we are nonetheless likely to be able to discern through ongoing observation the pattern of these judgments. To further our understanding, and to test our knowledge, we are likely to do a couple of things. First, we are likely to move from noting individual observations about what we believe these judgments to be, to trying to discern the internal logic of these judgments. (This really is a big step. The internal logic of these judgments of a very different society is likely to use different categories of understanding than we use.) Second, after we have modelled for ourselves the internal logic of this society's judgments we are likely to want to test our model by proposing hypotheses about what judgments of as yet unseen behaviour patterns are likely to be.

Now, if someone puts the question to us as to whether the judgments of these people are normative, the answer must begin, "It depends on your perspective." Clearly, for the people of the observed society the judgments (and the "system" of which they are a part) are normative. It tells them what they ought and ought not do. But while we as observers understand that it is normative for them, it is nonetheless not normative for us, ie, it does not tell us how to behave. But, if we go from observers of, to participants in the society we had been observing, what then are these norms to us? Unless the members of the society are going to grant us special status (and let's assume that they won't) then we can either comply with the requirements or face its consequences. But even if we decide to comply we can take different perspectives on what we are doing by complying. We can adjust ourselves so as to try to assume the beliefs of the people we are living with, or we can take our "scientific" knowledge and use it heuristically to avoid trouble (or we might find ourselves somewhere between these two options.)⁷⁸

Supervenience

Third, as I have already noted above (in the long footnote about naturalization) evaluative properties supervene on non-evaluative properties; if an apple is a good apple (evaluative) it is so because it possesses certain non-evaluative properties, it is "sweet,

⁷⁸ Of course anyone can be an anthropologist of her own society and its norms and approach them both externally and internally at the same time.

juicy, large, etc.,”⁷⁹ to use Sosa’s example. And such evaluations are objective. Consider Hare’s example:

Suppose we say ‘St. Francis was a good man’. It is logically impossible to say this and to maintain at the same time that there might have been another man placed exactly in the same circumstances as St. Francis, and who behaved in exactly the same way, but who differed from St. Francis in this respect only, that he was not a good man.⁸⁰

Now, the suggestion I am trying to counter is that law has a special epistemic status because it is a normative system. But normativity and evaluations generally follow upon natural properties. Of course it still might be the case that knowing what makes apples and saints good is different than being able to observe those facts in the world. But according to the positivist description of law, law is a normative order, morally inert and wholly constituted by a set of political institutions. In order for a lawyer to know what laws are applicable in a situation she does not engage in a special epistemic project of determining what the categorical imperative requires, but rather she consults the real world sources of law – the constitution, statutes, and case law. Discerning what legal norms are, whether in a modern legal state, or in a “primitive” society, does not in fact require special kinds of knowledge related to normativity, but only the ability to read legal sources, or discern regularized patterns of social behaviour.

14. Kinds of things

In an essay entitled “Natural Kinds”⁸¹ Quine puzzles over the idea of similarity, over the idea that two things are of a kind. Grouping things into kinds, things that are similar, is a fundamental aspect of how we understand the world and get around in it. And yet, the idea of similarity, of kind, Quine suggests, has a difficult relationship with either the ideas of logic or set theory. As animals in the world we would be utterly stymied without the capacity to distinguish like from unlike, to distinguish bear-like things from mother-like things. That we have an innate sense of kind is necessary for us to even acquire language. And, importantly for getting around in the world it gives us the capacity to make predictions about things. By understanding similarity we understand that constant conjunctions are causal, that similar series of events repeat themselves. The world we inhabit has a deep structure that produces certain kinds of predictable regularity. It is hard to imagine how it could be otherwise, but that it is, is quite fortuitous for us – it underpins the very possibility of knowledge.

Why does our innate subjective spacing of qualities accord so well with the functionally relevant groupings in nature as to make our inductions tend to come out right? Why should our subjective spacing of qualities have a special purchase on nature and a lien on the future? There is some encouragement in Darwin. If people’s innate spacing of qualities is a gene-linked trait, then the spacing that has

⁷⁹ E Sosa, n59, 551

⁸⁰ R.M. Hare, *The Language of Morals*, Clarendon Press, 1952, 145

⁸¹ W Quine, “Natural Kinds,” in *Ontological Relativity and Other Essays*, n59

made for the most successful inductions will have tended to predominate through natural selection. Creatures inveterately wrong in their inductions have a pathetic but praiseworthy tendency to die before reproducing their kind.⁸²

But if our sense of similarity and dissimilarity, of kinds, is essential for language learning and getting around in the world, if our innate subjective spacing does a good job on some level, then it is also limited in other ways. Colour seems very important to us as we work our way around in the world in a quotidian way, food gathering, for instance, but, Quine suggests, it is rather secondary (and at times a hindrance) for the scientist. But we also have the ingenuity to rise above our innate quality space. The scientist develops modified similarity standards for scientific purposes. We stop thinking of whales and porpoises as fishes. But,

[a] theoretical kind need not be a modification of an intuitive one. It may issue from theory full-blown, without antecedents; for instance the kind which comprises positively charged particles.⁸³

What we hope and strive for in developing our sense of similarity is a better understanding of reality. “Things are similar in the later or theoretical sense to the degree that they are interchangeable parts of the cosmic machine revealed by science.”⁸⁴ Ultimately both similarity and subjunctive conditionals such as “If this were in water it would dissolve” themselves dissolve in sciences that reach a certain maturity. In chemistry the dispositional account of solubility is replaced by a structural description of the mechanism.⁸⁵ The idea of a natural kind object, an object that intuitively seems to be a member of a class of objects in the natural world, then, is ultimately replaced by a theoretical type of object, an object that is a member of a class of objects in virtue not of an innate sense, but of a worked out and finer grain scientific (or epistemically serious) description of the world. It is my view that there is a range of phenomena common to human societies that can be roughly described as institutional obligatory norm enforcement that claims pre-eminence, or law, and that it makes sense, when being epistemically serious about the phenomenal world, to think of and investigate this range of phenomena as members of a class of related phenomena.

15. Conclusion

There is a fairly long running, if somewhat obscured, argument between ELTs and positivists about how to understand and describe law. In his recent “Demarcation Problem” Brian Leiter has raised good reasons to be sceptical of the question about law’s “nature.” However, ELTs have been consistently sceptical about this question and have instead always employed merely heuristic “definitions” of law that allow them to approach the “law” like other social phenomena that are normal epistemic objects. Positivists generally argue, as against natural law theorists, that the object they are

⁸² *ibid* 127

⁸³ *ibid* 128

⁸⁴ *ibid* 134

⁸⁵ *ibid* 136

interested in, actually existing positive law, is a social fact and its normative claims (its claims to tell us what we ought to do) are clearly distinguishable from the normative claims of morality; positivists frequently seem to be claiming that they are engaged in an analysis of objectively observable reality and the consequences that flow from those observations and descriptions. I have argued that positivism is generally more driven by a commitment to a specific ontology, a specific definition of “law”, than it is by epistemic goals of understanding the world. The positivist account relies on understanding “law” as having a special epistemic status. I have argued, that for several reasons, it makes more sense to think of law as a naturally occurring, though humanly created, social phenomenon, somewhat akin to natural languages, and that as such, it is a normal (non-special) epistemic object.